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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM VANDERWATER,

Petitioner,

vs.

FLOR LOPEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner, Judge Vanderwater, was awarded summary judgment in the Federal District Court upon a finding of judicial immunity in an action brought against him under 42 U.S.C. § 1983. The United States Court of Appeals for the Seventh Circuit reversed, and, in so doing, erroneously misconstrued and severely limited the application of the doctrine of judicial immunity as set out by this Court in *Stump v. Sparkman*, 435 U.S. 349 (1978). The opinion below, while it correctly held that Vanderwater was absolutely immune for his acts of arraigning, convicting and sentencing Lopez, made the hopelessly inconsistent finding that since the Judge participated in the process of determining what charges should be brought against respondent (erroneously held to be non-immune conduct), the Judge could, therefore, be held liable for any injuries arising out of the subsequent arraignment, sentencing and conviction—conduct which the court in the same opinion found to be immune. The questions presented are:

1. Whether petitioner, then an Associate Judge of the Sixteenth Judicial Circuit, Kane County, Illinois, is entitled to judicial immunity for his acts in participating in the process of determining what charges should be brought against a criminal defendant and for his acts in assisting to prepare written charges and other court forms connected with the case.

2. Whether such conduct was done in the clear absence of all jurisdiction according to the law of the State of Illinois.

3. Whether such conduct constituted the performance of a judicial act for an Illinois judge.

4. Whether it was proper for the Court of Appeals in this case to decide factual issues of liability and proximate cause when it held Vanderwater should be liable for injuries arising out of the same conduct for which Vanderwater was held to be absolutely immune.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this action reversing an order of the District Court granting summary judgment in favor of Petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 620 F.2d 1229 (1980) and is reproduced in Appendix A. The Memorandum Opinion and Order of the District Court is reproduced in Appendix E.

JURISDICTION

The final judgment of the Court of Appeals was entered on April 29, 1980. A timely petition for rehearing with suggestion for rehearing *en banc* was filed by the petitioner. The Court of Appeals denied petitioner's petition for rehearing on July 16, 1980 with no mention of the suggestion for rehearing *en banc* (Appendix C). The suggestion for rehearing *en banc* was denied on September 18, 1980 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 42 U.S.C. §1983, provides:

> *Civil action for deprivation of rights*
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ill. Rev. Stat. 1979, Chapter 38, §111-1, provides:

> *Methods of Prosecution.* When authorized by law a prosecution may be commenced by; (a) a complaint; (b) an information; (c) an indictment.

Ill. Rev. Stat. 1979, Chapter 38, §107-9 provides:

> *Issuance of arrest warrant upon complaint* 107-9. Issuance of Arrest Warrant Upon Complaint.

(a) When a complaint is presented to a court charging that an offense has been committed it shall examine upon oath or affirmation the complainant or any witnesses.

(b) The complaint shall be in writing and shall:

(1) State the name of the accused if known, and if not known the accused may be designated by any name or description by which he can be identified with reasonable certainty;

(2) State the offense with which the accused is charged;

(3) State the time and place of the offense as definitely as can be done by the complainant; and

(4) Be subscribed and sworn to by the complainant.

(c) A warrant shall be issued by the court for the arrest of the person complained against if it appears from the contents of the complaint and the examination of the complainant or other witnesses, if any, that the person against whom the complainant was made has committed an offense.

(d) The warrant of arrest shall:

(1) Be in writing;

(2) Specify the name of the person to be arrested or if his name is unknown, shall designate such person by any name or description by which he can be identified with reasonable certainty;

(3) Set forth the nature of the offense;

(4) State the date when issued and the municipality or county where issued;

(5) Be signed by the judge of the court with the title of his office;

(6) Command that the person against whom the complaint was made be arrested and

brought before the court issuing the warrant or if he is absent or unable to act before the nearest or most accessible court in the same county; and

(7) Specify the amount of bail.

(e) The warrant shall be directed to all peace officers in the State. It shall be executed by the peace officer, or by a private person specially named therein, and may be executed in any county in the State.

Ill. Rev. Stat. 1979, Chapter 38, §109-1(a), provides:

Person Arrested. (a) A person arrested without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county, and a charge shall be filed. A person arrested on a warrant shall be taken without unnecessary delay before the judge who issued the warrant or if he is absent or unable to act before the nearest or most accessible judge in the same county.

Ill. Rev. Stat. 1979, Chapter 38, §109-3(a) provides:

Preliminary examination. (a) The judge shall hold the defendant to answer to the court having jurisdiction of the offense if from the evidence it appears there is probable cause to believe an offense has been committed by the defendant.

Ill. Rev. Stat. 1979, Chapter 38, §114-1(a)(8) provides:

Motion to Dismiss Charge. (a) Upon the written motion of the defendant made prior to trial before or after a plea has been entered the court may dismiss the indictment, information or complaint upon any of the following grounds:

(8) The charge does not state an offense.

Ill. Rev. Stat. 1979, Chapter 110A, § 402(b), (c), (d)(1), provides:

> (Supreme Court Rule 402). *Pleas of Guilty.* In hearings on pleas of guilty, there must be substantial compliance with the following:
>
> (b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.
>
> (c) Determining Factual Basis for Plea. The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.
>
> (d)(1) The judge shall not initiate plea discussions.

STATEMENT OF THE CASE

Respondent, Flor Lopez, brought his action in the District Court claiming a violation of his civil rights under 42 U.S.C. §1983. He alleges that he was wrongfully arrested, convicted and incarcerated in the course of certain state court criminal proceedings against him in the Circuit Court of Kane County, Illinois.

Named as Defendants were the state court judge, William Vanderwater, an Associate Judge at the Circuit Court at the time in question and Howard Wheeler

Gamble, a private citizen who signed a criminal complaint against Lopez in the state court criminal case. Also named as Defendants were five policemen of the City of Aurora, Illinois, who have since been dismissed from the action. The material facts of the occurrence which formed the basis of the complaint were largely undisputed by the parties in both the District Court and the Court of Appeals.

Lopez alleges that he was wrongfully arrested by police after he entered an apartment residence in Aurora, Illinois, late on the evening of October 16, 1975. Lopez, although he had been a former tenant at said residence, had moved out of the apartment occupied by him at 128 W. New York Street, Aurora, Illinois, in late August or early September, 1975, because he was in arrears in rent.

Some time after Lopez entered the premises on the night in question other tenants in the apartment building were aroused by a disturbance caused by Lopez. One of the tenants, Donna Denton, called Judge Vanderwater at his home to report the incident.

William Vanderwater was, during the period from December 1974 to April 1976, an Associate Judge of the Sixteenth Judicial Circuit, Kane County, Illinois. Prior to his appointment as Associate Judge, Vanderwater joined in a partnership agreement with Gamble and two other individuals to purchase and operate the 128 W. New York Street apartment building. From the inception of the partnership agreement, Vanderwater collected the rents from the tenants at the building. Shortly after his appointment to the bench, Vanderwater requested that his partners buy out his interest in the building. This the remaining partners agreed to do as soon as possible. In the meantime,

Vanderwater continued to collect rents through October 1975.

Judge Vanderwater was at his home on the evening of October 16, 1975, when he received the telephone call from the complaining tenant. He then proceeded to the apartment residence. He took with him a small handgun which, although unloaded, he felt would provide some protection against any threat of violence by Lopez.

Upon arriving at the apartment residence, Vanderwater discovered Lopez lying asleep in the apartment which Lopez had previously rented. Vanderwater aroused Lopez and requested a tenant to call police who subsequently arrived and arrested Lopez.

Following his arrest, Lopez was taken to the Aurora Police Station. Judge Vanderwater also proceeded to the Police Station shortly thereafter. The Aurora Police Station is also the location of the Aurora Branch of the Sixteenth Judicial Circuit Court where misdemeanor, traffic and ordinance violations from the Aurora area are heard.

Shortly after Lopez was taken to the Police Station, it was discovered that he had on his person a key to the apartment, which he had invaded and which he had used to gain entrance. Judge Vanderwater identified this circumstance as potentially being the basis for a charge of theft of property under the value of $150 (a misdemeanor offense in Illinois). The Judge then contracted Howard Gamble, one of the co-owners of the premises, to inquire whether he, Gamble, was desirous of filing such a complaint for theft against Lopez. Gamble then proceeded to the Station and indicated that he would sign the complaint under oath before Vanderwater.

Lopez was then charged with theft of property (the key) of a value under $150.00 upon a complaint signed by Gamble on the evening of October 16th. The complaint when signed by Gamble was a blank form, which was typed in the following day by the state's attorney's staff as per Judge Vanderwater's instructions. Other court papers and an arrest warrant pertaining to the charges had been prepared by Judge Vanderwater in his own handwriting. On the same evening, Lopez, after having learned of the charge, requested that he be allowed to plead guilty. Lopez signed a written guilty plea and waiver of jury trial form which had also been prepared by Judge Vanderwater. Judge Vanderwater advised Lopez of rights of a criminal defendant, of his right to trial and of his right not to plead guilty.

Judge Vanderwater made the determination that Lopez persisted in his plea of guilty and that the plea should be accepted. Lopez was sentenced on the same evening by Judge Vanderwater to a term of 240 days imprisonment. Lopez now denies that he performed any conduct at the time which would be sufficient to constitute a voluntary plea of guilty to the offense. The sentence was later suspended by Judge Vanderwater and Lopez was released from the county jail six days later on October 22, 1975, upon a motion by an attorney subsequently hired by Lopez.

REASONS FOR GRANTING THE WRIT

As to Petitioner Vanderwater the decision below is in conflict with *Stump v. Sparkman*, 435 U.S. 349 (1978). The decision below purports to hold Vanderwater to be absolutely immune from suit for the arraignment, conviction and sentencing of a criminal defendant but then purports to hold that the same criminal defendant as a Federal Court Plaintiff may still prosecute Vanderwater under § 1983 for injuries arising out of the criminal case in which he was convicted.

Under the holding of the court of appeals in this case a state court judge is admonished that if he participates in the process of determining the charges brought or in the preparation of any document with respect to any criminal action when no state's attorney is present he does so at his own peril. One need only spend Saturday night in a police station to know how unworkable this procedure is.

I.

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE SCOPE OF JUDICIAL IMMUNITY ON FACTS SUCH AS IN THIS CASE.

The opinion below of the Seventh Circuit, is in conflict with the decision of the Fifth Circuit in the case of *Turner v. Raynes* decided January 31, 1980 and reported at 611 F.2d 92 (rehearing denied March 10, 1980 at 614 F.2d 1298, certiorari petition filed June 16, 1980 as docket number 80-162), and with the decision of the Ninth Circuit in the case of *Johnson v. MacCoy*, 278 F.2d 37 (1960).

The Ninth Circuit summarized the facts and nature of the *Johnson* case as follows:

> Appellant filed suit below under the Civil Rights Act (42 U.S.C. §1983) to recover damages against appellee, a judge of the Municipal Court of the Los Angeles Judicial District, State of California, alleging appellee had knowingly acted "in clear absence of jurisdiction" in issuing felony complaints against plaintiff on October 28, 1957, and again on December 23, 1957. Both felony complaints charged the same violation of the California Penal Code (Section 182, Subdivision 1), a conspiracy to commit a crime. Warrants for arrest were thereafter issued in each instance, and plaintiff was arrested. The first proceedings were dismissed by another judge of the same Municipal Court, Judicial District, upon the ground that the appellee had no jurisdiction to issue a felony complaint on the complaint of a private citizen, but only at the request of a prosecutive agency of the State of California. *Johnson, supra* at 38.

The Ninth Circuit noted that the California statutes required the district attorney to "institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses." That court then went on to find that:

> This puts no duty on him (the district attorney) alone to seek the charge or produce evidence sufficient to constitute a reasonable suspicion . . . The decision (to institute criminal proceedings) is not for the district attorney and only a district attorney to make . . . If it were solely the function of the district attorney to determine what the magistrate may consider the final veto power would be placed in the hands of the prosecuting officer, rather than a judicial officer . . . It would indeed be strange if a citizen could arrest another without a warrant for the commission of public offense . . .; be required to

> take him "without unnecessary delay, . . . before the nearest or most accessible magistrate in the county"; lay the complaint before the magistrate . . .; and then have all concerned await the district attorney, or his representative, to present something else. In remote areas of California, there is frequently a magistrate, but infrequently a deputy district attorney. *Johnson, supra* at 39-40.

The Ninth Circuit concluded that while state law authorized the district attorney to institute criminal proceedings, state law did not exclude others from also doing so. The Ninth Circuit found the state judge in the *Johnson* case immune from any liability in a civil action under § 1983, and rejected the theory that the judge was exercising a prosecutorial function which was outside his jurisdiction and not a judicial act.

The Fifth Circuit summarized the facts in the *Turner* case as follows:

> Even a summary statement of the facts is somewhat startling. Turner and a neighbor had a boundary dispute. The neighbor applied to defendant Raynes, a Texas justice of the peace, for a peace bond, and Turner was duly required to post bond conditioned on his behaving himself peaceably. It is not disputed here that the sole remedy for violating the conditions of such a bond is a suit by the state, brought in a trial court of general jurisdiction, to recover the penalty amount of the bond. Instead, when Turner apparently continued to behave obstreperously, Justice Raynes issued a warrant for his arrest on charges of "Violation of Peace Bond." Deputies of Sheriff Jones arrested Turner pursuant to the warrant, and Justice Raynes tried and sentenced him to a year and a day in jail for the nonexistent crime. Habeas, Turner's release, and this suit followed in rapid succession. *Turner, supra* at 93.

The clear implication from these brief facts is that it was Justice Raynes who chose the charges and prepared the warrant. There is no mention of a state's attorney or the sheriff taking part in either of these activities.

The Fifth Circuit concludes that Justice Raynes is absolutely immune from a civil action based on his conduct in charging, convicting and sentencing Turner.

The opinions of the Fifth Circuit and Ninth Circuit are in sharp contrast to the Seventh Circuit's narrow interpretation of judicial immunity in the instant case, and its erroneous application of the criminal procedures of the State of Illinois.

The opinion below by the Seventh Circuit correctly concedes that Vanderwater is immune in his acts of arraigning, convicting, and sentencing Lopez (opinion below at Appendix page 6). Failing to heed this Court's admonition that the Seventh Circuit takes an "unduly restrictive view" of the scope of judicial immunity, *Stump v. Sparkman, supra* at 359, the opinion below finds no immunity for Vanderwater's actions where it claims he "acted as prosecutor." Vanderwater is found not to have immunity for his acts of determining the offense to be charged and preparing the written charge on a "Notice to Appear" form (opinion below at Appendix page 9).

As more fully set forth in the following section, the relevant criminal procedure statutes in Vanderwater's case certainly do not prohibit his actions. In fact, unlike the state statutes in the Ninth Circuit's opinion in *Johnson, supra,* the Illinois statutes for commencing a criminal prosecution by complaint make no reference whatsoever to the role of the state's attorney or other prosecutor.

These same acts which are not subject to immunity in the Seventh Circuit, apparently are immune for judges in the Ninth and Fifth Circuits even though the state criminal procedure systems applicable in all three cases are not materially different. The twisted logic used by the opinion below in drawing the distinction between judicial acts and prosecutorial acts leads to the conclusion that the better view and the one in accord with this Court's precedent is that held by the Fifth and the Ninth Circuits.

After creating the dubious judge-prosecutor distinction the opinion below finds that because the non-immune acts were an "essential preliminary" to Judge Vanderwater's concededly immune acts there can be liability for the immune acts of sentencing and convicting Lopez (opinion below at Appendix page 11). The logic of this novel way to circumvent judicial immunity is incredible to say the least.

For every criminal defendant a judge is called upon to make many decisions and take many acts. According to the opinion below one erroneous non-judicial act at any stage which may be characterized as an "essential preliminary" to eventual incarceration subjects the judge to unavoidable civil liability regardless of the number of immune or perfectly correct judicial acts which follow.

In many cases a criminal defendant will appear before several different judges on his course through a state's criminal justice system. What happens if one judge at a stage which is an "essential preliminary" takes an erroneous non-judicial act? Does this obliterate the immunity of all judicial acts subsequently performed by other judges? Conceivably, the opinion below puts such judges to the decision of immediately releasing the

defendant or subjecting themselves to the possibility of civil liability no matter that any action they take would be normally immune as a judicial act.

There is a conflict among the circuits. This Court should resolve the conflict in accord with the view expressed by the Fifth Circuit in *Turner v. Raymes, supra,* and by the Ninth Circuit in *Johnson v. MacCoy, supra.*

II.

THE COURT OF APPEALS MISCONSTRUED THE ESTABLISHED LAW OF THE STATE OF ILLINOIS IN DETERMINING THE ISSUE OF JUDICIAL IMMUNITY.

The absolute immunity of Vanderwater in this action is based on the recent decision of this Court involving judicial immunity, *Stump v. Sparkman,* 435 U.S. 349 (1978).

On many occasions, especially when process is being issued in an emergency at night the only person with any legal training at all is the associate judge (in the old days the justice of the peace) and it is only reasonable to expect him to contribute a suggestion or two when needed or sought by a police officer or other person less skilled in the law. As noted by the Ninth Circuit in the *Johnson* decision, trained prosecutors are not available around the clock in most of the suburban or rural areas.

The decision below misapprehends the criminal law of Illinois which provides for the initiation of a criminal prosecution upon a verified complaint. The Illinois statutes specifically state the following about how criminal prosecutions may be commenced:

> Section 111-1, *Methods of Prosecution.* When authorized by law a prosecution may be commenced by; (a) a complaint; (b) an information; (c) an indictment. (Ill. Rev. Stat. 1979, Ch. 38, §111-1)

The historical notes to the above statutes specifically state:

> The distinction of the complaint rests in the fact that neither the Grand Jury nor the State's Attorney signs the written statement charging the crime. The Complaint is generally used in actions before a justice of the peace or magistrate and it is expected that this practice will continue before magistrates of the circuit court. (See Ill. Rev. Stat. 1961, Ch. 79, §165).

(Ch. 38, §111-1, Smith-Hurd Ill. Ann. Stat. 1970, pg. 337).

While the justice of peace and magistrate system has been abolished, the Illinois Code of Criminal Procedure as cited above remains intact, including the procedure for the filing of verified citizen's complaints before a judge. Even the form which was used in this case provided for the judge's signature.

The statute places no duty or responsibility upon the State's Attorney to give assistance to the lay person as to the contents of the complaint, which may also form the basis for a warrant to be issued by the judge (Ill. Rev. Stat. 1979, Ch. 38, § 107-9). If the statute meant otherwise, it would have said so.

As in the Ninth Circuit decision in *Johnson, supra,* state statute requires that:

> A person arrested without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county and a

> charge shall be filed. Ill. Rev. Stat. 1979, Chapter 38, §109-1(a).

As was obvious to the Ninth Circuit, though not to the Seventh Circuit, the above language does *not* mention any duty or role of a prosecutor. The language above taken literally would allow Vanderwater to do as he did in this case.

In the controlling case of *Stump v. Sparkman*, this Court noted that there was no express authority for Judge Stump's action. This Court found that fact would not eliminate his judicial immunity, rather this Court stated:

> But in our view, it is more significant that there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump. *Stump, supra* at 358.

The authority relied upon in the opinion below, in finding certain acts by Vanderwater as non-judicial acts and in the clear absence of all jurisdiction, are inapposite to the issue presented.

In finding that Vanderwater "acted as prosecutor" and therefore not immune the opinion below relies on *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979) and *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974). These two cases are clearly distinguishable from the case at hand.

In *Crowe* the judge had recently defeated the plaintiff in an election for alderman. At a subsequent meeting of the mayor and alderman, the plaintiff caused a disturbance and the defendant (who attended the meeting as an alderman) ordered that the plaintiff be arrested. The

Fifth Circuit held that it could be concluded that the defendant did this act as an alderman, not as a municipal judge. The court further noted that it was never contended that the parties believed the defendant was acting as a judge at the meeting; *Crowe, supra* at 990.

The reasoning of *Crowe* does not apply to the case at hand. As mentioned below, the deposition testimony indicates that no one thought of Vanderwater as a prosecutor; that the expectations of those present was that Vanderwater was acting in his capacity as circuit judge.

The facts of the *Gregory* case are obviously distinguishable from those of the case at hand. The Ninth Circuit framed the issue in the *Gregory* case as follows:

> Judge Thompson contends that a Justice of the Peace violates no right protected by 42 U.S.C. §1983 when he assaults a person in his courtroom. *Gregory, supra* at 62.

In finding such conduct not within the scope of judicial immunity the court stated:

> The decision to personally evict someone from a courtroom by use of physical force is simply not an act of judicial nature, and is not such as to require insulation in order that the decision be deliberately reached. A judicial act within the meaning of the doctrine may normally be corrected on appeal. *Gregory, supra* at 64.

In Vanderwater's case, his conduct was correctable within the criminal justice system. In fact, Lopez was released from jail after six days by Judge Vanderwater upon a motion by an attorney subsequently hired by Lopez. Furthermore, Lopez chose to forego his right to

appeal his conviction and expunge the conviction from his lengthy criminal record. Finally, though it should have been obvious to the court below, Vanderwater's conduct of filling in forms to institute criminal proceedings is clearly distinguishable from the assault and battery by the judge in *Gregory*.

The authority relied upon in the opinion below to find Vanderwater's conduct in the clear absence of jurisdiction is also inapposite. The opinion below states:

> Acting as a prosecutor is not within an Illinois circuit judge's jurisdiction over "justiciable matters," as granted by Ill. Const. Art. VI, §9, *Cf.* Ill. Rev. Stat., Chapter 110A, § 402(d)(1). (Appendix page 10, note 3)

There is a clear absence of logic in stating that Vanderwater's conduct was not within the scope of "justiciable matters."

Had certain of Vanderwater's acts been performed by a prosecutor, state law provides that a judge could review all the acts taken by that prosecutor. Upon preliminary examination a judge is required to determine if there is probable cause to believe an offense has been committed by the defendant, Ill. Rev. Stat. 1979, Chapter 38, §109-3(a). Upon a motion to dismiss the charge a judge is required to determine the propriety of the stated charge, Ill. Rev. Stat. 1979, Chapter 38, §114-1.

Surely if a judge may later review the prosecutor's conduct, there is no basis to say that such conduct if done by the judge in the first instance is not a "justiciable matter."

The second thread of authority relied upon by the opinion below states; "The judge shall not initiate plea discussions," Ill. Rev. Stat. 1979, Chapter 110A, §402(d)(1). It is unfortunate that the opinion below chose to ignore §§402(b) and (c). These sections require the judge to determine whether the plea is voluntary and that there is a factual basis for the plea. Thus even if Vanderwater did participate in any plea discussions such could only be in the excess of his jurisdiction and not in the clear absence of all jurisdiction.

The modern day associate circuit court judge runs the great likelihood that at times he will be the only one present with a criminal law knowledge when confronted with a request to witness the verification of a criminal complaint. The options open to the judge are few and unsatisfactory. He can assist the complainant in preparing a complaint which would lawfully commence the case. However, if he does so, according to the opinion below, he has taken off his judicial robes and put on the cap of a prosecutor.

The only other remaining alternative would be to shun the complaint procedure altogether. That could very well be denial of justice and a breach of his judicial oath. However, a judge who acted in such a way would insure that he would not be caught up in the tangled web of causation constructed by the opinion below so as to avoid being liable for civil rights injuries in the event that anything went wrong later on in the case.

If Judge Vanderwater directed the activity of the Aurora Police Station and courtroom on the night of the arrest, he was able to do so only because he was an Associate Circuit Judge. Had he been an ordinary lawyer or a layperson, it is certain that he would not have had the ability to give such directions. For no one (according to the deposition testimony) thought of him as a prosecutor or state's attorney. If he was wrong in issuing a warrant based upon a complaint that had not been fully typed and completed then such error was of a judicial nature, not a prosecutorial one. The intent of §1983 could not have been to have the federal courts looking over the shoulders of the state court judges to assure that all the paperwork was completed in a proper manner. It is important that this Court look at this case in its true setting—a small country town with limited prosecutorial personnel on hand to assist. It is not the setting of a large federal courthouse with a multitude of assistant district attorneys at the beck and call of the district judge.

There is no doubt that judicial immunity applies even where the judge is accused of acting maliciously and corruptly. However, such absolute immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (*Scott v. Steinfield*, LR 3 Ex 220, 223 (1868), quoted by this Court in *Pierson v. Ray* (1957) 386 U.S. 547 at 554)

In Vanderwater's case the public interest is without doubt best served by the application of judicial immunity. Vanderwater is no longer a judge. He was removed from the bench after a prompt investigation of this inci-

dent by the State of Illinois Courts Commission. Any damage done to the state criminal justice system by Vanderwater's conduct has been vindicated by an established state administrative procedure that does not impede the lawful exercise of judicial discretion. Failure to apply judicial immunity in this case will only serve to erode the independent judgment and freedom from intimidation presently enjoyed by state judges.

III.

THE OPINION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The opinion below reversed the district court's granting of summary judgment for Vanderwater. The principal grounds for the reversal was the difference of opinion on the scope of judicial immunity.

The court of appeals should have limited itself to what it concluded was the law of judicial immunity and remanded to the district court to determine the issues of fact. It is well settled that it is for the district court and not an appellate court to judge factual issues. *Jackson v. Statler Foundation*, (1974 2d Cir.) 496 F.2d 623.

The opinion below ignores that circuit's own wise warning that ". . . we must keep in mind that it is not within our province to make a determination of factual issues. The sole question is whether (defendants) . . . were entitled to summary judgment and thereby precluded (plaintiff) of the right to a hearing." *Devex Corp. v. Houdaille Industries, Inc.*, (1967 7th Cir.) 382 F.2d 17 at 21.

The opinion below not only reverses the district court's grant of summary judgment for Vanderwater, but in an excessive and unusual exercise of appellate power decided the factual issue of proximate cause (opinion below at Appendix page 10). This Court has previously reversed a Seventh Circuit opinion where that circuit had interfered with the trial court's responsibilities by presuming damages from civil rights violations, *Carey v. Piphus*, (1978) 435 U.S. 247, 55 L. Ed. 2d 252. On taking away the issue of causation from the trier of fact by presuming damages this Court stated:

> Moreover, where a deprivation is justified (or as here, immune) but procedures are deficient, whatever distress a person feels may be attributable to the justified (or immune) deprivation rather than to deficiencies in procedure. . . . This ambiguity in causation . . . provides additional need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself. *Carey v. Piphus, supra* at 263.

The effect of the opinion below is not merely to reverse the summary judgment for Vanderwater, but also, to attempt to institute an insurmountable summary judgment for Lopez *sub silentio*. The opinion below without the benefit of even a trial record has found Vanderwater liable to Lopez. The determination of proximate cause in the opinion below appears to be an effort to take away Vanderwater's right to a jury trial on that issue. A court of appeals should not decide critical factual issues, such as causation, because to do so ". . . disregards the nature of a trial, the function of the trial judge and the very limited function of the appellate court." *June T. Inc. v. King*, (1951 5th Cir.) 290 F.2d 404 at 405.

This Court should grant this petition for writ of certiorari and reverse the opinion below, so as to restore the much needed immunity for our state judiciary and to point out that it is not the province of an appellate court to establish law of the case on factual issues never reached or considered by the trial court. Further if proximate cause is an issue it should be decided in the first instance by the trial court and not the court of appeals.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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The above attorneys wish to acknowledge CRAIG S. MIELKE, who recently took the Illinois bar exam, for his assistance in the preparation of this petition.

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 79-1904

FLOR LOPEZ,

Plaintiff-Appellant,

v.

WILLIAM VANDERWATER and HOWARD WHEELER GAMBLE,

Defendant-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-3743—**Bernard M. Decker**, *Judge.*

ARGUED FEBRUARY 21, 1980—DECIDED APRIL 29, 1980

Before SPRECHER, TONE and WOOD, *Circuit Judges.*

TONE, *Circuit Judge.* This appeal concerns the scope of judicial immunity to be afforded under 42 U.S.C. § 1983 to a judge who engaged in highly irregular conduct. On the night of October 16, 1975, defendant Vanderwater, then an Illinois judge, arrested plaintiff Flor Lopez, caused him to be charged with petty theft, convicted him on the basis of a guilty plea that is alleged to have been forged, and sentenced him to jail for 240 days. Vanderwater accomplished all this with minimal aid from a business associate and several police officers; he proceeded without the assistance of a prosecutor, a defense attorney, a court reporter, or a court clerk. The

conviction took place near midnight in a police station in Aurora, Illinois. This § 1983 action by Lopez resulted.

The district court granted summary judgment for Vanderwater on the ground of judicial immunity. We reverse that ruling, because Vanderwater committed non-judicial acts under color of state law that proximately resulted in violations of Lopez' constitutional rights. The district court also granted summary judgment in favor of defendant Gamble, Vanderwater's business associate. We reverse that ruling also.

I.

At the time of the events that gave rise to this action Vanderwater was an associate judge of the Illinois Sixteenth Judicial Circuit. Before he became a judge, he, defendant Gamble, and two others owned an apartment building at 128 West New York Street, Aurora, Illinois. Although it is unclear whether Vanderwater retained an ownership interest in the building after he became a judge, he continued to perform his accustomed task of collecting the rent each week on behalf of the partnership; he did this up to and including the time of the events in question here.

Flor Lopez had been one of the tenants in the building, but had fallen behind in his rent. Because of the arrearages Vanderwater asked Lopez to move out, which he did in late August or early September, 1975.

From this point on, some facts are in dispute. As to them, any evidence favorable to Lopez must be accepted as true for purposes of our review of the summary judgment against him.

On the night in question, Vanderwater received a telephone call at his home in Aurora from a tenant reporting that Lopez was back in the building.[1] Vanderwater asked the tenant to call the police and proceeded to the building armed with a handgun. Find-

[1] Lopez testified on deposition that he had come to the building to pay Vanderwater the back rent.

ing Lopez asleep in what had formerly been his apartment, Vanderwater awakened him and detained him with the aid of the gun until the police arrived. At Vanderwater's behest, the police arrested Lopez on the charge of criminal trespass, searched him, and took him to the booking area of the Aurora Police Station, where Vanderwater also went.

The police station was housed in the same building as the Aurora Branch Court of the Illinois Sixteenth Judicial Circuit. The State's Attorney of Kane County also maintains an office in the building. On the night in question the court facilities of the Aurora Branch were locked, and no prosecutor or court personnel were present. Vanderwater was not assigned to sit in the Aurora Branch Court; he was assigned solely to the Geneva Branch.[2]

When Vanderwater arrived at the police station he telephoned Gamble and asked him to come down and sign a complaint against Lopez. At that time Vanderwater contemplated charging Lopez with criminal trespass. Before Gamble arrived, however, the police searched Lopez again and found a key on his person. When this discovery was reported to Vanderwater, he drafted in longhand a "Notice to Appear" charging Lopez with theft of the key. Vanderwater's deposition testimony about his decision to charge Lopez with theft instead of criminal trespass was as follows:

> Q. Your initial intent was to charge criminal trespass?

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[2] Illinois Supreme Court Rule 295, promulgated pursuant to the Illinois Supreme Court's rulemaking power under Ill. Const. art. VI, § 8, provides that "[t]he Chief Judge of each circuit or any circuit judge designated by him may assign an associate judge to hear and determine any matters except the trial of criminal cases in which the defendant is charged with an offense punishable by imprisonment for more than one year." The rule further provides that, "upon a showing of need," the Illinois Supreme Court may authorize individual associate judges to hear even felony cases. Ill. Rev. Stat. ch. 110A, § 295 (1977). Vanderwater was never assigned by Chief Judge Akemann of the Sixteenth Circuit to sit in Aurora or to hear Lopez' case.

A. When I was at 128 West New York Street and my only knowledge was that he had broken into the place again, my only intent was criminal trespass of land.

When he started talking in terms of pleading guilty, my thinking was—Like a couple of weeks ago, I had asked him specifically about the key. He denied the key. I found out about the key at the police station. Then my thinking changed to theft.

Q. Your thinking changed to theft while you were at the police station?

A. When I saw the key.

[Vanderwater Dep. 151.]

When Gamble arrived, he found Vanderwater with Daniel Toomey, one of the arresting officers, in the State's Attorney's office on the second floor of the police station building. These three being the only persons present, the evidence of what then occurred comes solely from their depositions. Gamble and Toomey signed the "Notice to Appear" Vanderwater had prepared, and Gamble also signed a blank complaint form. On the blank complaint form, Vanderwater certified in writing that Gamble had sworn to the truth of the allegations of the complaint. Vanderwater also signed a warrant for Lopez' arrest. Toomey testified that while the three were together Vanderwater stated that he would put Lopez away for 240 days in Vandalia State Prison. Vanderwater testified he probably said this in Gamble's presence. Gamble denied that he heard it said. Vanderwater also testified that the statement was "probably" made before Gamble signed the papers.

On a standard plea form, Vanderwater made entries indicating a guilty plea and a waiver of trial by jury. The form, thus modified, bears an illegible signature which Lopez says is not his.

While Lopez, according to his testimony, remained in his jail cell, he was, *in absentia*, arraigned, convicted, and sentenced by Vanderwater in the booking area of the police station. Vanderwater wrote on the bottom of

the guilty plea form that Lopez had pleaded guilty, had been found guilty, and had been sentenced to Vandalia for 240 days.

The following day Vanderwater gave directions to personnel in the State's Attorney's office to type in the blank complaint form Gamble had signed. These directions were carried out.

Lopez remained in jail for six days. On October 22, 1975, at the request of an attorney representing Lopez, Vanderwater entered an order suspending the 240-day sentence and directing that Lopez be released from custody. The judgment of conviction was vacated, and the case against Lopez was dismissed on November 25, 1975.

As a result of the Lopez incident, Vanderwater was removed from office by the Illinois Courts Commission.

Lopez commenced this § 1983 action against Vanderwater, Gamble, and five police officers in 1977. The five police officers have been dismissed from the case by agreement. Extensive depositions were taken by both sides. In December 1978 the district court denied a motion for summary judgment by Vanderwater. Thereafter, Vanderwater moved for reconsideration and Gamble moved for summary judgment. The court then entered summary judgment in favor of both defendants.[3] Vanderwater was held to be protected by judicial immunity under *Stump v. Sparkman*, 435 U.S. 349 (1978), and Gamble was held not liable because the facts showed no more than that he asked a judge to exercise his powers, which was insufficient to create liability in view of *Sparkman v. McFarlin*, 601 F.2d 261 (7th Cir. 1979) (in banc). This appeal followed.

[3] The district court originally denied the motion because it found that Vanderwater may have acted in the clear absence of all jurisdiction by purporting to try a case in a courthouse to which he had not been assigned. The district court subsequently reversed this determination when it came to light that Vanderwater's Chief Judge, Judge Akemann, had expressed the view in a Special Administrative Order that assignment was not a prerequisite for subject matter jurisdiction. *See* note 7 *infra*.

II.

The doctrine of absolute judicial immunity, as it applies to suits under 42 U.S.C. § 1983, will protect a judge against liability for a given act if two conditions are satisfied. First, the act must not have been taken in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)). Protection may be afforded even if the act was prompted by malicious or corrupt reasons, "flawed by the commission of grave procedural errors," or taken in excess, but not in clear absence, of jurisdiction. *Id.* at 356, 359.[4] Second, the act must be a "judicial act." *Id.* at 360-62. *Sparkman* stated,

> The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by

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[4] The distinction between acts taken in "excess" of jurisdiction and acts taken in the "clear absence of all jurisdiction" was illustrated in *Sparkman* with examples taken from *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 352 (1872):

> [I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

435 U.S. at 357 n.7. The Court in *Sparkman* further said that, in determining whether a clear absence of jurisdiction has been shown, the fact that the power to take a given action is not expressly included in a judge's jurisdiction under state law is less significant than the fact that it is not expressly excluded from that jurisdiction. 435 U.S. at 358. For judges of general jurisdiction, at least, this distinction appears to some to raise the spectre of judges who are "free, like a loose cannon, to inflict indiscriminate damage." *Id.* at 367 & n.5 (Stewart, J., dissenting). As we read *Sparkman*, however, a two-step inquiry is required; immunity will not be accorded an act that is non-judicial whether or not it is taken in the clear absence of all jurisdiction. *See id.*

> a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.

Id. at 362.

Lopez argues that Vanderwater acted in the "clear absence of all jurisdiction" because he acted outside a courtroom and had not been assigned to sit in Aurora or to hear the case. Before addressing these arguments, it is to be noted that Vanderwater was authorized by law to hear the kind of case in which he acted and in fact had general jurisdiction except in felony cases.[5] Lopez' argument that a judge has no jurisdiction outside a courtroom is without merit. Valid judicial acts are often performed outside the courtroom.[6] That the papers were signed in a police station instead of in a courtroom therefore does not mean that they were signed in clear absence of jurisdiction.

The district court was also correct in concluding that the absence of an assignment to the Aurora Branch of the court or the particular case did not result in clear absence of all jurisdiction. There is some dispute concerning whether the assignment requirement is jurisdic-

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[5] Illinois associate judges may hear misdemeanor cases but not felony cases without special designation. Illinois Supreme Court Rule 295; *see* note 2 *supra*.

[6] Many judicial acts, including signing orders, ruling on motions, and conducting conferences with parties, are taken in chambers and not in a courtroom. It is not unusual for a judge to act on emergency stays and other matters of extreme urgency in his home. Appellate courts sometimes sit to hear argument in law schools. There is no formalistic requirement that a judge set foot inside a courtroom before he can act.

Plaintiff's counsel has cited some rather hoary Illinois precedent concerning a judge's power outside the courtroom. *E.g.*, *Rafferty v. People*, 72 Ill. 37 (1874); *People v. McWeeney*, 259 Ill. 161, 102 N.E. 233 (1913). Whether these cases remain the Illinois law or not, we think they do not demonstrate that Vanderwater acted in clear absence of jurisdiction as that concept is employed in *Sparkman*. They deal merely with acts in "excess" of jurisdiction, as opposed to acts in clear absence of jurisdiction, as *Sparkman* employed those terms.

tional under Illinois law,[7] but we think at most the absence of assignment rendered Vanderwater's actions in excess of, but not in clear absence of, jurisdiction.[8] Under *Sparkman*, this is not enough to deprive him of immunity. 435 U.S. at 357-58 & n.6.

Plaintiff's counsel also argues, as we understand him, that the totality of the circumstances in this case are enough to have deprived Vanderwater of all jurisdiction. Among these circumstances are the facts that Vanderwater had an interest in the case,[9] that he had prejudged the case,[10] and that he proceeded to judgment despite his knowledge of fundamental constitutional infirmities in the procedure that was followed. Even "grave procedural errors," however, are not enough, under *Sparkman*, to deprive a judge of all jurisdiction. 435 U.S. at 359. Malice and corruption are similarly insufficient. *Id.* at 356. Therefore, Vanderwater's acts in arraigning, convicting, and sentencing Lopez, outrageous as they were, were not, under *Sparkman*, taken in the clear absence of all jurisdiction.

The district court was also correct in concluding that these acts were "judicial acts." They satisfy the *Sparkman* criterion of functions "normally performed by a judge." *See* 435 U.S. at 362. The second criterion,

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[7] Chief Judge Akemann of the Sixteenth Judicial Circuit has rejected the view that assignments are jurisdictional in his Special Administrative Order No. 22. *But cf. Charleston Nat. Bank v. Muller*, 16 Ill. App. 3d 380, 306 N.E.2d 358, 361 (1974) (dicta).

[8] *Sparkman* makes plain that for purposes of immunity, a judge's jurisdiction "must be construed broadly." 435 U.S. at 356. Vanderwater's actions in trying the case in Aurora are more like those of a criminal court judge who invents a crime and convicts someone of it than they are like those of a probate judge who conducts a criminal trial. *See* note 4 *supra*.

[9] Lopez has cited us to Illinois Supreme Court rules requiring that judges both be and appear impartial. Ill. Rev. Stat. ch. 110A, §§ 61 & 66. Although Vanderwater plainly violated these rules, we do not think that action deprived him of all jurisdiction.

[10] *See* note 14 *infra*.

whether the parties "dealt with the judge in his judicial capacity," seems inapplicable here. Vanderwater himself was, in substance if not in form, the complainant; Lopez, the only party other than the state, was, if we are to believe his deposition testimony, unaware of the entire course of the proceedings and thus unable to deal with Vanderwater in his judicial role or otherwise during the proceedings.[11] The question of immunity can hardly turn on whether Gamble, who was only formally the charging party and was not present at the judicial segment of the events leading to Lopez' incarceration, dealt with Vanderwater as a judge.[12]

Accordingly, Vanderwater is absolutely immune from suit under 42 U.S.C. § 1983 for his acts of arraigning, convicting, and sentencing Lopez.

III.

The irregular arraignment, conviction, and sentence were not, however, the only acts of Vanderwater that proximately caused Lopez' injury. Vanderwater acted as prosecutor. He made the decision to prosecute. He determined the offense to be charged, originally contemplating criminal trespass and then deciding on theft of the key. He prepared a written charge on the "Notice to Appear" form. He caused Gamble to sign the blank complaint form and the next day had that form completed by the State's Attorney's staff. He prepared a guilty plea and waiver of jury and caused a signature, which he says was Lopez', to be placed thereon. Finally,

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[11] The same was true in *Sparkman*, in which plaintiff was unaware that any court proceedings had been had until after she had been sterilized pursuant to the court's approval of her mother's petition. Her expectations were not, apparently, considered relevant by the Supreme Court.

[12] In one respect, extending judicial immunity to Vanderwater here is more appropriate than was the extension of immunity to the judge in *Sparkman*. Here at least error could be corrected on appeal. *See Pierson v. Ray*, 386 U.S. 547, 554 (1967). The same cannot be said of the wrongful conduct at issue in *Sparkman*. 435 U.S. at 369-70 (Powell, J., dissenting); *id.* at 368 (Stewart, J., dissenting).

Vanderwater presented the charge and plea form to himself with the expectation that it would be the basis for an unconstitutional conviction and sentence. These acts were not functions "normally performed by a judge." They were not, therefore, "judicial acts," and are not, as a consequence, protected by judicial immunity. *Stump v. Sparkman*, *supra*, 435 U.S. at 360; *see Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974).[13]

These prosecutorial acts by Vanderwater were both the actual and the proximate cause of several violations of Lopez' constitutional rights, including, *inter alia*: his due process right to a disinterested judge, *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927); his due process right to a judge who had not prejudged his case,[14] *United States v. Sciuto*, 531 F.2d 842, 844-46 (7th Cir. 1976); *see United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966); his right under the Sixth and Fourteenth Amendments to the advice of counsel at each critical stage in the proceedings, *e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v.*

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[13] The prosecutorial acts were also taken in "clear absence of all jurisdiction," although this conclusion is unnecessary to our holding, *see* note 4 *supra*. Acting as a prosecutor is not within an Illinois circuit judge's jurisdiction over "justiciable matters," as granted by Ill. Const. art. VI, § 9. *Cf.* Ill. Rev. Stat. ch. 110A, § 402(d)(1).

[14] Vanderwater testified in his deposition that he "probably" told Gamble before Gamble signed the complaint that Lopez "was going to plead guilty to it," and that Vanderwater "was going to sentence him to 240 days." Officer Toomey testified that Vanderwater remarked on several occasions that night that he was going to give Lopez an eight-month sentence. Vanderwater's opinion on Lopez' guilt was formed not on the basis of a guilty plea that had not been received yet, nor on the basis of any facts of record in the case, but on his extra-judicial opinion and belief that Lopez had stolen the key. *Cf. United States v. Grinnel Corp.*, *supra*, 384 U.S. at 583. Also, Toomey testified that Vanderwater instructed him to give Gamble the key on the night in question, and that Toomey did so. Vanderwater was apparently so certain of the outcome of the case that he was willing to release the critical evidence from official custody.

Wainwright, 372 U.S. 335 (1963); and his rights, absent waiver, to a jury trial, a public trial, compulsory process, and to confront adverse witnesses. U.S. Const. Amends. 6 & 14. Even under Vanderwater's version of the events in question, these rights were abridged. Vanderwater's acts as a prosecutor were intended to make possible, and were an essential preliminary to, the series of wrongs that culminated in Lopez' illegal conviction and sentence.[15]

Vanderwater's prosecutorial acts were taken under color of state law within the meaning of 42 U.S.C. § 1983. The "under color" of state law element of a § 1983 claim is identical to the "state action" requirement in an action based on the Fourteenth Amendment. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). Action taken by a state official who is cloaked with official power and who purports to be acting under color of official right is state action and is taken under color of state law whether or not the action is in fact in excess of the authority actually delegated to the official under state law. *E.g., Screws v. United States*, 325 U.S. 91, 111 (1945):

> It is clear that under "color" of law means under "pretense" of law. . . . Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was

[15] The acts were the "actual" cause in that but for the acts the violations would not have occurred. Whether the concept of proximate cause is viewed in terms of foreseeability or in terms of a policy against liability for acts sufficiently causally remote, the acts in question were also the proximate cause of Lopez' injuries. Vanderwater clearly foresaw the result of his prosecutorial actions, and thus his own contemplated acts can scarcely be deemed intervening and superseding causes. Indeed, the fact that Vanderwater foresaw the result is one of independent constitutional injuries that Lopez sustained, the prejudgment of his case. *See* note 14 *supra*. Vanderwater's prosecutorial acts were not remote from the injury caused either in time or in a causal chain. We can perceive no policy that would favor cutting off liability for the acts on a proximate cause rationale.

> designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.[16]

See also, e.g., United States v. Price, supra, 383 U.S. at 795; *Monroe v. Pape*, 365 U.S. 167, 171-87 (1961) (overruled in an unrelated respect by *Monell v. Department of Social Services*, 436 U.S. 658 (1978)); *Williams v. United States*, 341 U.S. 97, 98-100 (1951); *United States v. Classic*, 313 U.S. 299, 326 (1941); *Gregory v. Thompson, supra*, 500 F.2d at 62 (cited with approval in *Stump v. Sparkman, supra*, 435 U.S. at 361 n.10).

Counsel for Vanderwater has argued, however, that this accepted rule does not apply to judicial acts. As phrased in Vanderwater's brief, counsel contends that plaintiff Lopez is "whipsawed" between the "absence of all jurisdiction" and "judicial acts" requirements and the color of law requirement. If jurisdiction is absent or the act is not judicial, counsel maintains, the color of law requirement is not met; if the color of law requirement is met, the act is judicial and jurisdiction is present. Acceptance of this theory would remove the limitations on absolute judicial immunity discussed above and render judges immune from any suit whatsoever under § 1983. In *Sparkman* the Court did note that an allegation that a judge's action was taken under color of law may appear inconsistent with a contention that the same act was not a "judicial act," 435 U.S. at 360; *but cf.* 435 U.S. at 369 n.6 (Stewart, J., dissenting). That passing observation, however, could hardly have been intended to wipe out limitations on judicial immunity implicitly recognized elsewhere in the opinion. There is no reason to differentiate between judges and other officers in applying the color of law requirement. Vanderwater was able to take his prosecutorial acts because he was cloaked with the office of judge. His use

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[16] Although *Screws*, as well as *Price*, *Williams*, and *Classic*, cited in text *infra*, dealt with 18 U.S.C. § 242, the criminal counterpart to the civil provisions of § 1983, the under color of law requirement in both sections is the same. *Monroe v. Pape*, 365 U.S. 167, 185 (1961).

of that office to prosecute Lopez was action under color of state law.

Because Vanderwater is not immune from liability for his prosecutorial acts, and because those acts were an integral part of his unlawful course of conduct, we reverse the summary judgment in his favor[17] and remand this aspect of the case to the district court.

IV.

As to Gamble, who did not act under color of state law, any liability must rest on the theory that he conspired with Vanderwater, who did so act, to deprive Lopez of his civil rights. We could see no basis for an inference of conspiracy if Gamble had merely responded to Vanderwater's call, come to the police station, and, based on information about Lopez' conduct given him by Vanderwater, signed the papers charging Lopez with theft of the key. Signing the blank complaint was of course improper, but it hardly gives rise to a federal right, especially when Gamble understood that the complaint would contain the same charge as the handwritten notice to appear, which he also signed. Also, Gamble knew Vanderwater, a judge, was behaving like a prosecutor; but, even if we impute to Gamble knowledge of the proper limits of a judge's function, he would not be joining in a conspiracy by signing the papers in the good faith belief that the facts were true, at least unless he knew that the complaint would not be submitted to the State's Attorney for approval and presented before a disinterested judge. If Gamble, in good faith and without such knowledge, did no more than sign the appropriate papers to lodge a complaint against Lopez for theft of the key, relying on information that Vanderwater had supplied and that Gamble had no reason to doubt, Lopez could not make out a claim against Gamble under § 1983; for in that event Gamble would merely be invoking the exercise of judicial

[17] Vanderwater has not claimed prosecutorial immunity and is obviously not entitled to it because he was not a prosecutor.

authority. *Sparkman v. McFarlin*, 601 F.2d 261 (7th Cir. 1979) (in banc).

There is, however, enough evidence to raise a genuine issue that precludes summary judgment. That issue is whether Gamble knew when he signed the charging papers that Vanderwater was carrying out a scheme to use his official position to railroad Lopez by first causing a charge to be brought and then acting as the judge in the ensuing case after already deciding what the outcome would be. Officer Toomey testified that in Gamble's presence Vanderwater stated that he intended to sentence Lopez to 240 days in Vandalia. Vanderwater first testified he was "sure" he had made such a statement in Gamble's presence, then that Gamble was "conceivably" present when the statement was made and Vanderwater did not know whether it was before or after Gamble had signed the papers, and finally that before Gamble signed the statement Vanderwater "probably told [Gamble] . . . that [Lopez] was going to plead guilty to it; and . . . that I was going to sentence [Lopez] to 240 days." Gamble denied that such a statment was ever made in his presence. We think the testimony of Toomey and Vanderwater was sufficient to raise a genuine issue as to whether, before signing the papers, Gamble heard Vanderwater make the statement in question.

If Gamble heard such a statement, the trier of fact would be entitled to find that he credited the statement, and that by signing the papers he participated with Vanderwater in a conspiracy to use Vanderwater's official position to deprive Lopez of his civil rights. As we have noted, Vanderwater himself was not immune for his prosecutorial acts, so Gamble would not escape liability for engaging in a conspiracy of which those acts were an essential part even if the rule were that a conspirator automatically shares a co-conspirator's immunity, which it is not, *see Sparkman v. McFarlin*, *supra*, 601 F.2d at 264-68 (Sprecher, J., concurring). Even apart from the prosecutorial acts, however, Gamble's signing of the charging papers with knowledge of Vanderwater's intentions would be evidence of more

that "merely . . . invoking an exercise of the judge's judicial authority," *see Sparkman v. McFarlin, supra*, 601 F.2d at 262 (Fairchild, C.J., concurring); *id.* at 269 (Tone, J., concurring), and could give rise to liability under § 1983.

The summary judgment is therefore reversed as to both Vanderwater and Gamble, and the case is remanded to the district court for trial.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Opinion by Judge Tone

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

April 29, 1980

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

FLOR LOPEZ,
Plaintiff-Appellant,

No. 79-1904 vs.

WILLIAM VANDERWATER, Individually, and as an Associate Judge of the Sixteenth Judicial Circuit of Kane County, Illinois, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 77-C-3743
Bernard M. Decker, JUDGE

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with costs, in accordance with the opinion of this court filed this date.

APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 16, 1980.

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. *

FLOR LOPEZ,
Plaintiff-Appellant,

No. 79-1904 vs.

WILLIAM VANDERWATER and HOWARD WHEELER GAMBLE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 77 C 3743
Bernard M. Decker, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-appellees, a majority of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Hon. Philip W. Tone heard oral argument and participated in the original decision of the panel, but did not participate in consideration of the petition for rehearing.

APPENDIX D

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 18, 1980

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. *

FLOR LOPEZ,
Plaintiff-Appellant,

No. 79-1904 vs.

WILLIAM VANDERWATER and HOWARD WHEELER GAMBLE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 3743
Bernard M. Decker, Judge.

ORDER

On consideration of the petition for rehearing *in banc* filed in the above-entitled cause by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Philip W. Tone heard oral argument and participated in the original decision of the panel, but did not participate in consideration of the petition for rehearing.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 3743

FLOR LOPEZ,

Plaintiff,

-vs-

WILLIAM VANDERWATER, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

The amended complaint in this §1983 action alleges that the plaintiff, Flor Lopez, was wrongfully arrested, convicted and incarcerated as a result of the actions of the defendants. Five of the seven defendants originally named have been stricken or dismissed by stipulation. The remaining two defendants are William Vanderwater, formerly an Associate Judge of the Sixteenth Judicial Circuit of Kane County, Illinois and Howard Wheeler Gamble.

By memorandum opinion and order dated December 18, 1978, the court denied a motion by Vanderwater for summary judgment based on absolute judicial immunity. Vanderwater has moved for reconsideration of that order. In addition, there are now pending a motion for summary judgment filed by the defendant Gamble; a motion for partial summary judgment filed by the plaintiff; and motions to strike and dismiss the affirmative

defenses of Vanderwater and Gamble, which were also filed by the plaintiff.

A. *Motion for Reconsideration.*

In the memorandum opinion and order of December 18, 1978, the court analyzed the recent Supreme Court decision involving judicial immunity, *Stump v. Sparkman*, 435 U.S. 349 (1978), and noted various passages from that decision:

> "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction'." 435 U.S. at 356-57.
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> "The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." 435 U.S. at 362.

The court then ruled that Vanderwater was not entitled to summary judgment on the basis of judicial immunity on the ground that he acted "in the clear absence of all jurisdiction." This conclusion was based on evidence indicating that Vanderwater was assigned to hear cases in the courthouse in Geneva, not to that in Aurora.

However, on reconsideration, the court has concluded that this decision was erroneous. There is no question that Vanderwater was an Associate Judge of the Sixteenth Judicial District. Although there is some basis for saying that the jurisdiction of an Associate Judge extends only so far as his assignment by the Chief Judge of his circuit,[1] this is a tenuous claim, and has been

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[1] *See Charleston National Bank v. Muller*, 16 Ill.App.3d 380 (4th Dist. 1974) (dicta).

specifically rejected by the Chief Judge of the Sixteenth Circuit, Judge Ackeman.[2] At any rate, this is not enough to meet the "clear absence of jurisdiction" requirement of *Sparkman, supra.*

The question remains whether the defendant's motion for summary judgment on the ground of judicial immunity must now be granted. The plaintiff makes several arguments against this conclusion. However, it is first necessary to briefly restate the undisputed facts of the case.

The plaintiff, Lopez, lived in an apartment at 128 West New York, Aurora, Illinois ("the apartment building"). Although there is some dispute over the nature of the defendant Vanderwater's interest in the apartment building, it is beyond dispute that he was responsible for collecting rents through October, 1975, and that his business associate, the defendant Howard Gamble, did have an ownership interest in the property. Lopez was behind in his rent payments, and in late August or early September, 1975, Vanderwater and Gamble asked him to move out. Apparently Lopez did move out at that time. However, on October 16, 1975, in the late evening, Lopez went to the apartment building and fell asleep on the premises; he contends that he went there in order to pay Vanderwater the back rent which he owed. After receiving a telephoned complaint from another tenant, Vanderwater went to the apartment building, armed with a gun which he claims was unloaded, awoke Lopez, and took him into custody (the parties disagree as to the precise sequence of events at the apartment building).

Lopez was taken to the Aurora Police Station, which is also the location of the Aurora Branch of the Sixteenth Judicial Circuit Court, where misdemeanor, traffic, and ordinance violation cases are heard. Vanderwater called Gamble, as the owner of the apartment building, and asked him to come to the Police

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[2] See Special Administrative Order No. 22.

Station immediately to complete complaint forms. Meanwhile, during a search of Lopez, the police officers found a key to the apartment building and showed it to Vanderwater. Vanderwater then prepared a form indicating a plea of guilty and waiver of jury trial; the parties dispute whether Lopez signed this form, and the signature is illegible. At the bottom of this form, Vanderwater made notations indicating that Lopez pled guilty, was found guilty, and was sentenced to imprisonment in Vandalia State Prison for 240 days. Sometime soon thereafter, Vanderwater and/or the police officers prepared a complaint and a warrant indicating that Lopez was charged with illegal possession of a key belonging to Gamble, a misdemeanor. Gamble signed the complaint and a notice to appear (the plaintiff contends that the forms were blanks when Gamble signed them).

Lopez was imprisoned for several days, until at the request of Lopez's attorney, Vanderwater signed a suspension of sentence order. This order was dated October 22, 1975. The plaintiff alleges that he suffered severe distress and humiliation and lost substantial amounts of money as a result of his conviction and imprisonment.

The plaintiff first argues that Vanderwater acted in the "clear absence of jurisdiction" because he was both prosecuting witness and judge, and thus he had a conflict of interest for which he should have removed himself from the case. However, the failure to recuse oneself is, in the terms employed in *Bradley v. Fisher*, 13 Wall. 335 (1872), and quoted in *Stump v. Sparkman*, *supra*, at 357 n. 7, an act "in excess of jurisdiciton" rather than one "in the clear absence of jurisdiction". Thus, it is not the type of conduct which will destroy judicial immunity.

Next, the plaintiff argues that there are genuine issues of fact regarding whether the misconduct alleged constituted "judicial acts" within the meaning of *Stump v. Sparkman*. Once again, it is important to note that although the complaint recites certain conduct of Vanderwater's which allegedly occurred prior to the

plaintiff's arrest, the §1983 claim is limited to injury caused by the plaintiff's conviction and imprisonment. Thus, the important question is whether Vanderwater's activity in connection with the conviction and imprisonment is fairly considered to be "judicial acts", see memorandum opinion and order, Dec. 18, 1978, at 4.

As quoted above, the Supreme Court in *Stump v. Sparkman* isolated two factors to be considered in the determination whether a particular act is "judicial":

> "The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." 435 U.S. at 362.

The amended complaint alleges that Vanderwater asked Gamble to sign a complaint (¶11), and sentenced the plaintiff to 240 days at Vandalia State Prison (¶13). In addition, the record indicates that Vanderwater completed a form indicating that Lopez pled guilty and waived jury trial on a charge of illegal possession of a key belonging to Howard Gamble, and helped to prepare the complaint. Finally, the record indicates that after Lopez was imprisoned for several days, Vanderwater signed a suspension of sentence order.

These acts, apart from their motivation, certainly involve functions which are normally performed by a judge, or at least by one acting on behalf of a judge or in his presence. The plaintiff contends, however, that there are genuine issues of fact concerning whether the parties "dealt with the judge in his judicial capacity." However, the undisputed facts clearly establish that all of the police officers, Gamble, and the plaintiff himself, were aware that Vanderwater was a judge in the Sixteenth Circuit, and believed that he had the power to convict and sentence persons charged with misdemeanor offenses. The plaintiff's attempt to raise a dispute on this issue simply must fail.

Accordingly, the court is compelled to withdraw its prior ruling, and to hold that Vanderwater is entitled to summary judgment on the basis of judicial immunity, *Stump v. Sparkman, supra.* The court notes that Vanderwater's conduct in connection with Lopez's case was investigated by the Illinois Courts Commission, and that Vanderwater has been removed from his position as Associate Judge.

The memorandum opinion and order of December 18, 1978, is hereby withdrawn; the defendant Vanderwater's motion for summary judgment is hereby granted. The complaint against this defendant is hereby dismissed.

B. *Howard Gamble's Motion for Summary Judgment.*

This motion is based on two grounds. First, Gamble contends that he cannot be liable because his only contact with the alleged violation of the plaintiff's rights was through Vanderwater, an immune party; and second, Gamble asserts that the undisputed facts establish that he did not participate or have any knowledge of any wrongful acts or conspiracies.

In support of this motion, Gamble has submitted his own affidavit and deposition, and parts of the depositions of Lopez, Vanderwater, and the police officers who were present during the events in dispute. In contrast, the plaintiff has not offered any additional affidavit or evidence in support of his allegations against Gamble. This undisputed evidence indicates that Gamble was told by Vanderwater that Lopez was found on the premises of the apartment building, and that he had a key to one of the apartments, which he was not authorized to have. Vanderwater asked Gamble to sign a complaint based on this information. Gamble signed a notice to appear, which contained this information, and a blank complaint form, which was later filled out with this information.

Thus, there is no evidence to indicate that Gamble agreed or otherwise actively conspired with Vander-

water to deprive the plaintiff of any rights.[3] Indeed, the amended complaint itself does not allege an agreement between Gamble and Vanderwater, but rather simply makes the conclusory charge that Gamble "acquiesced and conspired with the other defendants," and that he "with full knowledge of the facts, conspired with the other defendants and pursued a course of conduct designed to cause the wrongful arrest, conviction and continued incarceration of the plaintiff."

In *Sparkman v. McFarlin*, ... F.2d ..... (7th Cir. May 2, 1979), the Seventh Circuit declined to adopt a per se rule that a private party may never be liable under §1983 for acting in concert with an immune state actor, but nevertheless held that in order to succeed on such a claim, the plaintiff must allege and prove more than simply that the private party asked the immune actor to exercise his powers. Although the dimensions of this rule are not clear, the allegations and evidence in this case do not meet its requirements. The allegations are merely conclusory, and the undisputed facts establish that Gamble did not engage in "joint activity" with Vanderwater. Thus, Gamble is entitled to summary judgment, and his motion is hereby granted.

In sum:

Both defendants' motions for summary judgment are hereby granted, and the cause is hereby dismissed.

ENTER:

/s/ Bernard M. Decker
United States District Judge

DATED: July 6, 1979.

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[3] There is a conflict in the evidence regarding whether Gamble overheard Vanderwater say that he would sentence Lopez to eight months imprisonment. However, even accepting Officer Toomey's version, which is the one most favorable to the plaintiff, Gamble did not overhear this comment until after he had given information to Toomey and had indicated that he would sign the complaint.